NO. 46765-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

PHYLLIS HOLMAN,

Appellant.

RESPONDENT'S SUPPLEMENTAL BRIEF

RYAN JURVAKAINEN
Prosecuting Attorney
JODY NEWBY/WSBA 41460
Deputy Prosecuting Attorney
Representing Respondent

HALL OF JUSTICE
312 SW FIRST
KELSO, WA 98626
(360) 577-3080

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I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

1. The trial court did not err by when it entered all of Holman's LFOs.

2. The trial court did not err when it entered finding of fact 2.5.

II. STATEMENT OF THE CASE

Phyllis Holman was sentenced for Possession of Methamphetamine on September 16, 2014. RP 164-175. At sentencing, her attorney acknowledged the State's recommendation and requested five days in custody. He also asked the court to consider her financial circumstances and the fact that the fines and costs would be punishment enough. RP 170.

> "One thing that I noted was the amount of the fine that I had asked the Court to waive and just in looking at the numbers for someone in – in Ms. Holman's situation and her financial circumstances it just underscores that – the fact that the fines alone are – are certainly a significant penalty for someone in Ms. Holman's situation." RP 170

The Judge then, in acknowledgement of her situation, struck the $1000 fine. He also noted, "[t]here's other financial obligations that you'll be in charge of Ms. Holman." RP 172. The Judgement and Sentenced was filed the day of sentencing, and including a boilerplate finding that she had the ability likely future ability to pay. CP 36.

III. ARGUMENTS

A. Holman waived her right to object to the imposition of legal financial obligations by failing to object to their imposition below.

Holman alleges that the trial court erred by finding that she has the ability either in the present or future to pay legal financial obligations, premised largely upon the court's alleged failure to consider his ability to pay at the time of sentencing under RCW 10.01.160(3). Holman bears the burden of demonstrating she can raise this issue for the first time on appeal. "A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review." *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015).

"RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them." *State v. Kuster*, 175 Wn. App. 420, 425, 306 P.3d 1022 (2013) (citing *State v. Guzman Nunez,* 160 Wn. App. 150, 157, 248 P.3d 103 (2011) (citing *State v. Scott,* 110 Wn.2d 682, 685, 757 P.2d 492 (1988)), *aff'd,* 174 Wn.2d 707, 285 P.3d 21 (2012)). Furthermore, under RAP 2.5(a), appellate courts can refuse to address an issue sua sponte. *State v. Kirkpatrick,* 160 Wn.2d 873, 880 n. 10, 161 P.3d 990 (2007), *overruled in part on other grounds by State v. Jasper,* 174 Wn.2d 96, 271 P.3d 876 (2012).

RAP 2.5(a) gives three exceptions that allow an appeal as a matter of right. Like in *Blazina*, Holman does not argue an exception to RAP 2.5. However, the Washington Supreme Court holds that the exception found in *State v. Ford* does not apply because "[u]npreserved LFO errors do not command review as a matter of right under *Ford* and its progeny."

Here, Holman did not object to the imposition of LFO at sentencing, therefore the court should exercise its discretion and decline to reach the merits.

B. Even if the court considers the issue properly before the court, the court did not err when it entered all of the LFOs.

The court reviews the trial court's decision to impose discretionary financial obligations under the clearly erroneous standard. *State v. Baldwin,* 63 Wn. App. 303, 312, 818 P.2d 1116 (1991), 837 P.2d 646 (1992). "A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all the evidence leads to a 'definite and firm conviction that a mistake has been committed.' " *Schryvers v. Coulee Cnty. Hosp.,* 138 Wn. App. 648, 654, 158 P.3d 113 (2007) (quoting *Wenatchee Sportsmen Ass'n v. Chelan County,* 141 Wn.2d 169, 176, 4 P.3d 123 (2000)).

"The State's burden for establishing whether a defendant has the present or likely future ability to pay discretionary legal financial obligations is a low one." *State v. Lundy,* 176 Wn. App. 96, 106, 308 P.3d 755 (2013). Indeed, "a trial court is prohibited from imposing legal financial obligations only when it appears from the record that there is no likelihood that the defendant's indigency will end." *Id.* at 99, 308 P.3d 755. In *State v. Duncan*, the court considered the reasons in which a defendant may not want to tell the court he will never be employable nor have the ability to pay his LFOs. 180 Wn. App. 245, 250, 327 P.3d 699 (2014). "But having come to the conclusion that ability to pay LFOs is not an issue that defendants overlook—it is one that they reasonably waive—we view this as precisely the sort of issue we should decline to consider for the first time on appeal." *Id.* at 253. Here in addition to the "boilerplate" finding that the court considered Holman's present and future ability to pay, we have an actual discussion on the record of her ability to pay. Her attorney argues that the $1000 fine should be waived given her financial situation, and that the court should not follow the State's recommendation, and impose fewer days in jail because the other costs will be punishment enough. RP 168-170. Defense counsel argued, as a sentencing tactic, that the imposition of LFO should be imposed instead of jail. The trial judge, in acknowledgement of the defense argument, struck the $1000 fine, imposed only five days in jail,

and explained to Holman that she would be responsible for the rest. RP 170. Unlike in *Blazina*, here the defense accepted the costs, and the court considered financial situation when it struck the $1000 fine and imposed a light sentence. 182 Wn.2d at 839.

Many of the LFOs do not have an exception for indigency. For example, the court in this case imposed a $500.00 victim assessment penalty. CP 76. Under RCW 7.68.035(1)(a), this assessment must be imposed on every defendant who is convicted of a felony. The statute does not contain any exception for indigency. Similarly, pursuant to RCW 43.43.7454(1), a $100.00 biological sample fee must be included in every sentence for which a biological sample must be taken. This includes every case in which a person is convicted of a felony. *Id.* Again, there is no exception for indigent defendants.

IV. CONCLUSION

For the above stated reasons, the conviction should be affirmed.

Respectfully submitted this 21 day of July.

RYAN JURVAKAINEN
Prosecuting Attorney

By:

JODY NEWBY
WSBA # 41460
Deputy Prosecuting Attorney
Representing Respondent

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Jodi R. Backlund
Attorney at Law
P.O. box 6490
Olympia, WA 98507
backlundmistry@gmail.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on July 24th, 2015.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

July 23, 2015 - 3:07 PM

Transmittal Letter

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